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No. 92-938

IN THE

Supreme Court of the United States

October Term, 1992

MAURICE RIVERS
and
ROBERT C. DAVISON,
Petitioners,

vs.

ROADWAY EXPRESS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN T. LANDWEHR
Counsel of Record
THOMAS J. GIBNEY
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: (419) 241-6000
Attorneys for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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QUESTIONS PRESENTED

1. Does the legislative expansion of 42 U.S.C. §1981 contained in the Civil Rights Act of 1991, enacted and effective on November 21, 1991, apply retroactively to pending cases?

2. Should the Court reverse its decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) to apply its interpretation of 42 U.S.C. §1981 to pending cases?

LIST OF PARTIES

Respondent, Roadway Express, Inc. ("Roadway") is a wholly-owned subsidiary of Roadway Services, Inc. There is no additional parent or subsidiary company to be listed pursuant to Rule 29.1.

Petitioners' list of parties (Petition at ii) contains minor misstatements. The claims of James T. Harvis, Jr., a co-plaintiff with petitioners Maurice Rivers and Robert C. Davison ("Rivers" and "Davison" respectively when referred to individually, and "Petitioners" when Rivers and Davison are referred to jointly), were not severed by the district court from those of Rivers and Davison, but separate trials were conducted. (3/14/89 Memorandum and Order of the District Court.) The district court's November 30, 1988 grant of summary judgment to Roadway and defendant Local 20, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union") dismissed Petitioners' and Harvis' hybrid §301 (29 U.S.C. §185(a)) claims. (11/30/88 Memorandum and Order at 2-3.) Other claims asserted by Petitioners and Harvis against the Union were earlier dismissed or withdrawn. (12/1/87 Pretrial Order; 6/6/88 Report and Recommendation; 9/1/88 Order.) Those other claims were also abandoned on appeal. Petitioners list of parties is otherwise correct.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. The Applicability Of The Civil Rights Act Of 1991 Does Not Determine The Entitlements Of The Parties In This Case 8

II. The Essential Determination Of The Sixth Circuit Is Not In Conflict With The Decision Of Any Other United States Court Of Appeals On The Same Matter 11

III. The Presumption Against Retroactivity Does Not Impair Petitioners' Retaliation Claims .. 12

IV. Petitioners' Complaints About Judicial Restraint Or The Lack Thereof Do Not Warrant Supreme Court Review 14

V. There Exists No Conflict Regarding The Application Of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) 15

CONCLUSION 16

APPENDIX:

Decision of the United States District Court in *Harvis, et al. v. Roadway Express, Inc., et al.* (October 18, 1990) A1

Decision of the United States Court of Appeals for the Sixth Circuit in *Harvis, et al. v. Roadway Express, Inc., et al.* (January 10, 1991) A14

TABLE OF AUTHORITIES

Cases:

Alpo Pet Foods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C. Cir. 1990) 13

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 12,13

Bradley v. Richmond School Bd., 416 U.S. 696 (1974) 12

Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) 13

Davis v. San Francisco, 976 F.2d 1536 (9th Cir. 1992) 6,9,11

DeVargas v. Mason and Hanger-Silas Mason Co., Inc., 911 F.2d 1377 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 799 (1991) 13

Gersman v. Group Health Ass'n, Inc., 975 F.2d 886 (D.C. Cir. 1992) 13

Harvis v. Roadway Express, Inc., 923 F.2d 59 (6th Cir. 1991) 1

Harvis v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. 1992) 2,7,8,9,11,15

James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) 15

Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992) 15

Kaiser Aluminum and Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) 6,12

Lehman v. Burnley, 866 F.2d 33 (2nd Cir. 1989) 13

Leland v. Federal Ins. Adm'n, 934 F.2d 524 (4th Cir.) *cert. denied*, 112 S. Ct. 417 (1991) 13

Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992) 15

Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir.) *cert. denied*, 113 S. Ct. 207 (1992) 13

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 1,4,7,15

Sargisson v. United States, 913 F.2d 918 (Fed. Cir. 1990) 13

Simmons v. A.L. Lockhart, 931 F.2d 1226 (8th Cir. 1991) 13

Storey v. Shearson-American Exp., 928 F.2d 159 (5th Cir. 1991) 13

Wagner Seed Co. v. Bush, 946 F.2d 918 (D.C. Cir. 1991) *cert. denied*, 112 S. Ct. 1584 (1992) 13

Statutes:

28 U.S.C. §1254(1) 2

42 U.S.C. §1981 ..... *passim*

42 U.S.C. §2000e *et seq.* 4

Civil Rights Act of 1991 ..... *passim*

§101 6,9,11,14

§113(b) 6,9,11

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OPINIONS BELOW

Roadway supplements the opinions submitted by Petitioners with (1) the October 18, 1990 Findings of Fact and Conclusions of Law of United States District Judge John W. Potter of the Northern District of Ohio, Western Division, rendered after a full trial on the merits of Petitioners' claims of discrimination, and (2) the opinion of the Sixth Circuit reported as *Harvis v. Roadway Express, Inc.*, 923 F.2d 59 (6th Cir. 1991), the previous Sixth Circuit decision rendered on Harvis' appeal.

The order of the district court is significant because it summarizes the evidence adduced at Petitioners' one week trial in the district court on their claims of race discrimination; Petitioners omit mention of their trial.

The Sixth Circuit's previous opinion is significant because the Court can see that the applicability of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) was conceded; Petitioners' second "Question Presented" was waived below.

The district court opinion is set out at A1-A13 of the included Appendix ("App.") and the Sixth Circuit opinion is set out at App. A14-A19.

JURISDICTIONAL STATEMENT

Petitioners pray for exercise of court's jurisdiction pursuant to 28 U.S.C. §1254(1) which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Court should decline to exercise its jurisdiction. The Sixth Circuit has determined that Petitioners' claims are actionable under 42 U.S.C. §1981 ("§1981") as it existed *before* the Civil Rights Act of 1991 ("the 1991 Act"). *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 494-495 (6th Cir. 1992).[1] Therefore, the retroactive application of the 1991 Act is no longer a material issue in this case.

[1] The two opinions of the Sixth Circuit in this case, the one addressing Harvis' claims and the one addressing Petitioners' claims, have been reported under identical captions. This citation and all subsequent citations are to the opinion addressing Petitioners' claims.

STATUTES INVOLVED

The statutes offered by Petitioners are supplemented with the statute governing the conduct in this case. §1981, before the 1991 Act, provided:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioners were terminated from Roadway in 1986 under similar circumstances and they sued Roadway claiming, *inter alia*, race discrimination under §1981 and Title VII (42 U.S.C. §2000e *et seq.*). (Petition at 3a.) On January 19, 1990 the district court determined that Petitioners failed to state claims under §1981. (Petition at 22a-24a.) Petitioners' identical claims under Title VII were tried to the district court during a one week trial in the Spring of 1990; Petitioners were unable to prove their claims. (App. at A1-A13.)

The Sixth Circuit determined on appeal, however, that Petitioners had sufficiently plead a claim under §1981, as that statute was interpreted by this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). (Petition at 9a.) The Sixth Circuit remanded the case further proceedings under §1981, including the potential for a second trial with a jury and with the availability of compensatory and possibly punitive damages. (Petition at 14a.)

A brief summary of the facts of this case is warranted. Petitioners failed to attend disciplinary hearings scheduled for them on August 22, 1986. (App. at A4-A5.) Both were suspended two days based on their individual work records. (*Id.*) Both grieved the two day suspensions. (*Id.*) Both argued that they had received insufficient notice of the hearings and had they received sufficient notice they would have attended. (App. at A5.) Both were awarded two days of back pay. (App. at A6.)

Roadway notified Petitioners and the Union that new hearings would proceed within three days after the grievance awards were announced. (App. at A6.) Hearings were scheduled for Petitioners and other employees while they were on duty. (App. at A7-A9.)

Petitioners were ordered numerous times to attend their hearings. (*Id.*) Both refused. (*Id.*) Petitioners' hearings took place on September 26, 1986. (*Id.*) Both were terminated for their failure to obey several direct orders and for their accumulated work records. (App. at A9.)

Three white employees were scheduled for hearings at the same time. (App. at A6-A7.) One of those employees, like Petitioners, refused numerous direct orders to attend a hearing while on the clock and was terminated. (App. at A9-A10.) Another complied with orders to attend a hearing and was not terminated. (*Id.*) The third was not at work and on duty when his hearing was scheduled. (*See*, App. at A6-A7, A9-A10.)

SUMMARY OF ARGUMENT

Petitioners' claims for relief will not be enhanced by this Court's review of the question whether the 1991 Act should be applied retroactively. Petitioners assert that the "procedures and remedies" of the 1991 Act should be applied if this case is retried. (Petition at 7-8.) Petitioners, however, have not and cannot point to any change the 1991 Act could have on the procedure to be followed or the relief available when their claims are reprocessed by the district court. Specifically, Petitioners may already seek a jury trial and compensatory and punitive damages.

Petitioners' claim of a conflict between the Sixth Circuit and the Ninth Circuit is inaccurate. Below, the Sixth Circuit addressed §101[2] of the 1991 Act. In *Davis v. San Francisco*, 976 F.2d 1536 (9th Cir. 1992), the Ninth Circuit addressed §113(b)[3] of the 1991 Act. *Id.* at pp. 1549-1550. Only the holding on the actual section at issue can be claimed determinative of the outcome of each case. The Sixth Circuit and the Ninth Circuit have not, therefore, rendered a decision in conflict "on the same matter." Rule 10.1(a).

The presumption against the retroactive application of statutes is clearly favored in American law. There is no reviewable conflict among the courts of appeals whether the 1991 Act should be presumed not to be retroactive. Any "apparent tension" is so far removed from the issues material to this case that Supreme Court review here is not warranted. *See, Kaiser Aluminum and Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990).

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[2] §101 expands §1981 and is set out in the Petition at pp. 2-3.

[3] §113(b) authorizes the award of expert fees under Title VII as follows:

> (b) Civil Rights Act of 1964—Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended by inserting "(including expert fees)" after "attorney's fee".

In rejecting retroactivity, the Sixth Circuit stated that its *reasoning* applied to the 1991 Act as a whole. *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 497 (6th Cir. 1992). Other courts looking at other sections of the 1991 Act have emphasized that their *holdings* applied only to the particular sections considered in those cases. That difference in approach is not a conflict warranting a writ of certiorari. The Sixth Circuit's statements are broader than its holding, and *dictum* is not a sufficient basis for review by this Court.

In the district court, petitioners conceded that this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) applied to their claims. The Sixth Circuit concurred. There is no conflict among the courts of appeals on this issue. The issue is not one of national significance because the 1991 Act expands the scope of §1981. The addition of new language to §1981 to achieve that expansion only confirms that the prior protection afforded by the statute was limited. No question worthy of this Court's review exists here.

ARGUMENT

I. THE APPLICABILITY OF THE CIVIL RIGHTS ACT OF 1991 DOES NOT DETERMINE THE ENTITLEMENTS OF THE PARTIES IN THIS CASE.

Despite Petitioners' allegations at pages 5 through 8 of their Petition, this case would be a particularly poor case for the Court to select to decide whether the 1991 Act should be applied retroactively. Retroactive application of the 1991 Act or any of its individual provisions would not make Petitioners' claims more viable, would not change the procedures to be followed, and would not increase the potential type or amount of remedies available to Petitioners on remand in the district court. Petitioners may already seek a jury trial and compensatory and punitive damages in addition to the equitable relief they sought at their first trial.

Although the Sixth Circuit affirmed the district court's dismissal of Petitioners' race discrimination in firing claims, *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 491 (6th Cir. 1992), it explained that "the very basis of their complaint has always stemmed from retaliatory discharge." *Id.* at p. 494. Therefore, from the beginning, Petitioners have always understood their retaliation claims to encompass the same subject matter.

Neither Rivers nor Davison has or can point to any entitlement he would have under the 1991 Act that he does not now have under the 1866 Act. Petitioners have not and cannot show how applicability of the 1991 Act is an issue of concern to them in enhancing their chances of success on remand. Petitioners appear more interested in having the Court resolve an issue of ideological and political interest than in finally resolving their dispute with Roadway. Thus, this case would not be an appropriate selection to bring the issue of whether the 1991 Act applies retroactively into focus. The fulcrum of

the adversarial process—the motivation to obtain an outcome securing or defending a private litigants' rights—is sorely lacking. Selecting this case to resolve that issue would only unnecessarily delay the conclusion of this litigation.

Petitioners' proffer three reasons why this Court should accept this case for review; all three are easily dismissed.

First, Petitioners claim that §101 of the 1991 Act is at issue in many pending cases. (Petition at 7.) While that is true, Petitioners neglect to mention that the courts of appeals that have considered §101 have unanimously ruled against retroactivity; as noted above and as discussed in detail below, the Ninth Circuit decision in *Davis v. San Francisco*, 976 F.2d 1536 (9th Cir. 1992) concerns whether §113(b) of the 1991 Act is retroactive not whether, as here, §101 of the 1991 Act is retroactive. The absence of any circuit conflict dispels the relevance of the amount of litigation on §101.

Second, Petitioners cite the Sixth Circuit's discussion of the 1991 Act "as a whole." (Petition at 7.) *See, Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 497 (6th Cir. 1992). Whether the Sixth Circuit rejected the retroactivity of the entire 1991 Act or just §101 is not relevant to Petitioners' cause. The difference between analyzing legislative enactments section by section or reviewing the entire act is simply not a material issue in this case because no party's rights can be affected by a ruling on the question. Petitioners have not shown that the more limited approach adopted by some courts has actually created irreconcilable results in judicial holdings.

Petitioners' third and final point, that this case is going to be retried anyway (Petition at 7-8), is the very reason why this case would be particularly inappropriate to select for further review. Because the Sixth Circuit's decision rendered irrelevant any concern over the applicability of the 1991 Act, its remand dictates that this case is not ripe for review.[4]

This case is unique not for the questions raised by Petitioners, but for the sole issue decided in Petitioners' favor by the Sixth Circuit. Heretofore claims of retaliation had not required a showing of racial animus, merely retaliatory conduct. Petitioners theorized and the Sixth Circuit approved the viability of claims for "discriminatory retaliation" under §1981 as it existed before the 1991 Act. Petitioners now have the opportunity to prove their claims.

Previously at the district level, Petitioners were only denied the right to proceed under §1981. The Sixth Circuit has granted Petitioners that right. Petitioners had nothing else at stake before the Sixth Circuit and have nothing more to gain before this Court.

There could hardly be a less appropriate case for the Court to review on the issue of the applicability of the 1991 Act. The applicability of the 1991 Act is simply not relevant or material in this case. Petitioners' request for a writ of certiorari should be denied.

[4] Petitioners allege the existence of a separate motion apparently seeking consolidation of their petition with petitions filed in other cases addressing the application of the 1991 Act. (Petition at 8.) If a motion exists, Roadway has not received a copy. In any event, the distinction in this case, the Sixth Circuit's remand of petitioners' claims which were found actionable, warrants quick disposal of Petitioners' petition. Roadway is opposed to any motion to consolidate and will file a formal response if it ever receives any such motion.

II. THE ESSENTIAL DETERMINATION OF THE SIXTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS ON THE SAME MATTER.

Petitioners' claim of a conflict is premised on the Ninth Circuit case *Davis v. San Francisco*, 976 F.2d 1536 (9th Cir. 1992). (Petition at 8-15.) The only portion of the 1991 Act even marginally relevant to Petitioners' claims is §101. *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 495 (6th Cir. 1992). In *Davis*, the Ninth Circuit was concerned only with §113(b) of the 1991 Act. *Davis v. San Francisco*. 976 F.2d 1536, 1549-1550 (9th Cir. 1992). Although both courts discussed the applicability of the 1991 Act as a whole, the broad language used was unnecessary to each decision; in the end each decision dealt only with a specific and different section of the 1991 Act. The distinction between the actual sections addressed negates Petitioners' suggestion of a present circuit conflict which must be immediately resolved by this Court.

III. THE PRESUMPTION AGAINST RETROACTIVITY DOES NOT IMPAIR PETITIONERS' RETALIATION CLAIMS.

Petitioners err in suggesting that the Court should use this case to resolve any conflict that remains between the decisions in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) and *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974). Two years ago, the Court chose not to reconcile the two lines of precedent in *Kaiser Aluminum and Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990), because reconciliation was unnecessary to the resolution of the case. Reconciliation is similarly unnecessary in this case because the Sixth Circuit has determined that Petitioners' retaliation claims survive under §1981 as it existed *before* the 1991 Act. Application of the 1991 Act, based on a presumption favoring retroactivity, would not enhance Petitioners' prospects for success on remand.

The great majority of circuit courts have concluded that *Bowen* is the better rule of law and are appropriately applying a presumption against retroactivity absent a clear expression of legislative intent to the contrary.[5] Whatever tension remains may resolve itself and is not material to adjudicating the rights of the parties in this case.

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[5] *See, Lehman v. Burnley*, 866 F.2d 33, 37 (2nd Cir. 1989); *Davis v. Omitowoju*, 883 F.2d 1155, 1170-1171 (3d Cir. 1989); *Leland v. Federal Ins. Adm'n*, 934 F.2d 524, 528-529 (4th Cir.) *cert. denied*, 112 S. Ct. 417 (1991); *Storey v. Shearson-American Exp.*, 928 F.2d 159, 161-162 (5th Cir. 1991). *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 936 (7th Cir.) *cert. denied*, 113 S. Ct. 207 (1992); *Simmons v. A.L. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991); *DeVargas v. Mason and Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1392 (10th Cir. 1989) *cert. denied*, 111 S. Ct. 799 (1991); *Gersman v. Group Health Ass'n*, 975 F.2d 886, 900 (D.C. Cir. 1992); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924 (D.C. Cir. 1991) *cert. denied*, 112 S. Ct. 1584 (1992); *Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964, note 6 (D.C. Cir. 1990); and, *Sargisson v. United States*, 913 F.2d 918, 922-923 (Fed. Cir. 1990).

IV. PETITIONERS' COMPLAINTS ABOUT JUDICIAL RESTRAINT OR THE LACK THEREOF DO NOT WARRANT SUPREME COURT REVIEW.

Petitioners describe as a "conflict" the difference between addressing the 1991 Act as a whole, as the Sixth Circuit did in this case, and limiting a decision to the specific section of the 1991 Act at issue. (Petition at 20-21.) That difference does not represent a true substantive conflict as much as an issue of judicial restraint. Clearly, whether the Sixth Circuit found §101 prospective or the whole 1991 Act prospective is a distinction without a difference to Petitioners' cause. To the extent Petitioners or other litigants disagree with statements not necessary to the outcome of this case, they may seek to distinguish those statements as *dictum*. The alleged "conflict" identified by Petitioners is truly more theoretical than real and is absolutely irrelevant to the respective rights and duties of the individual litigants in this case. Further involvement by this Court is not warranted.

V. THERE EXISTS NO CONFLICT RREGARDING THE APPLICATION OF *PATTERSON V. McLEAN CREDIT UNION*, 491 U.S. 164 (1989).

Whether this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) should apply retroactively was a new issue Petitioners raised for the first time in the court of appeals. In the district court, Petitioners conceded *Patterson* applied to their claims. (*See*, 8/25/89 Plaintiffs' Response to Show Cause Order at 1.) The Sixth Circuit addressed the issue and agreed that *Patterson* controlled. *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 493 (6th Cir. 1992). Because this Court in *Patterson* applied its holding to the facts before it, the retroactivity of *Patterson* is a closed issue. *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). *See, Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1374 (5th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 227 (7th Cir. 1992).

Yet, Petitioners claim that the applicability of *Patterson* to pre-1991 Act cases should be reconsidered. (Petition at 21-25.) That, however, is not a relevant issue in this case. Despite *Patterson*, the Sixth Circuit remanded Petitioners' claims for further proceedings. There is, moreover, no conflict among the courts of appeals on this issue. Petitioners simply claim the Sixth Circuit erred; it did not. There is, finally, not even an issue of national concern. The 1991 Act dictates the diminishing role *Patterson* is and will be playing in the federal courts. There is, therefore, nothing to compel Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. LANDWEHR
Counsel of Record
THOMAS J. GIBNEY
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: (419) 241-6000
Attorneys for Respondent

January 4, 1993

APPENDIX

DECISION OF THE UNITED STATES DISTRICT COURT IN HARVIS, *ET AL.* V. ROADWAY EXPRESS, INC., *ET AL.*

(Filed October 18, 1990)

Civil No. C86-7955

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES T. HARVIS, JR., *et al.*,
Plaintiffs,

vs.

ROADWAY EXPRESS, INC., *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

POTTER, *J.*:

This cause came on for trial on plaintiffs Robert C. Davison and Maurice Rivers' complaint alleging that they were discriminated against on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (Title VII). In an order dated March 14, 1989, this Court separated the trial of plaintiff Harvis from the trial of plaintiffs Rivers and Davison. The trial of plaintiff Harvis ended in a jury verdict in favor of defendant Roadway Express, Inc. (Roadway) on June 13, 1989. Since plaintiffs Rivers and Davison alleged only

violations of Title VII and, hence, were not entitled to have their claims heard by a jury, their case was tried upon the facts without the jury. Roadway is the only defendant which plaintiffs proceeded against at trial. The extensive briefing done by the parties has resulted in the Court having before it plaintiffs' pre-trial proposed findings of fact and conclusions of law, defendant's pre-trial proposed findings of fact and conclusions of law, defendant's post-trial proposed findings of fact and conclusions of law and plaintiffs' opposition thereto, and plaintiffs' post-trial proposed findings of fact and conclusions of law and defendant's opposition thereto. The Court has considered these materials and makes the following findings of fact and conclusions of law.

Preliminarily, the Court denies defendant's motion to dismiss plaintiffs' amended complaint (Doc. No. 282) for two reasons. First, this motion was filed out of time. On September 11, 1989, this Court issued a pre-trial order setting the trial of this cause to commence on February 27, 1990. Among other things, this Order also set the motion practice cut-off date at eight weeks prior to trial. Defendant's instant motion was filed February 27, 1990, the day of trial. For this reason alone, the Court would deny the motion. However, defendant's motion asks this Court to dismiss plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Since this Court may reexamine subject matter jurisdiction at any point in the proceedings, it has examined the merits of defendant's motion. In doing so, the Court finds the motion not well taken.

Defendant contends that plaintiffs failed to assert their Title VII claims within 90 days after the EEOC notified plaintiffs of their right to bring suit. Assuming that the right-to-sue letter was issued June 30, 1987, as

defendant alleges, plaintiffs attempted to bring suit on these claims by moving for leave to amend their complaint on September 29, 1987. Clearly, plaintiffs' motion for leave to amend evidenced plaintiffs' intent to bring suit under Title VII. Defendant can claim no prejudice by the apparent confusion which resulted in plaintiffs' filing the amended complaint on October 18, 1988. Therefore, the Court has jurisdiction to address the merits of the case, and defendant's motion will accordingly be denied.

FINDINGS OF FACT

1. Plaintiffs are black male citizens of the United States and reside within the territorial jurisdiction of this Court.

2. Defendant does business in Toledo, Ohio and is an employer within the meaning of 42 U.S.C. §2000(b).

3. Plaintiffs began working for Roadway in 1972 in Akron, Ohio. Rivers began working on the dock, while Davison began working in the garage. Both plaintiffs transferred to the Roadway facility in Toledo, Ohio in 1975.

4. Roadway Garage Manager Ed Guy and Union business Agent Paul Toney agreed upon August 20, 1986 as the date on which a hearing would be held to discuss Davison's accumulated work record. On August 15, 1986, a letter was sent out to confirm this date. The hearing was postponed and rescheduled for August 22, 1986 by agreement between Mr. Guy and Mr. Toney.

5. Paul Toney was the union representative who was responsible for scheduling disciplinary hearings with defendant. Mr. Toney testified that he would mislead and even lie to Roadway in his attempts to stall hearings

in the hope of resolving the matter on an informal basis. Mr. Toney used this procedure for a number of employees, both black and white.

6. Toney testified that he believed that some time prior to August 22, 1986 Guy became aware of his stalling tactics and his history of avoiding disciplinary hearings. Plaintiffs were employees for whom Toney had employed such tactics. As a result, Guy demanded that a disciplinary hearing occur within 72 hours of the request. This procedure was a proper notification procedure due to a 1971 ruling.

7. On the morning of August 22, 1986 at approximately 7:30 A.M., Davison was told by foreman Bill Thompson that there was going to be a disciplinary hearing concerning Davison. Davison was told to go to the office and complied. When he arrived at the garage office, Davison told Guy that he had not received a letter in the mail informing him of a hearing and the [sic] he would not attend the hearing. Guy told Davison that he had received the proper notice for the hearing and that the hearing would be held whether he was there or not. Davison then left the office.

8. Davison was subsequently informed by Toney that he had received a two-day suspension as a result of the hearing that was conducted in his absence. That suspension was based on Davison's accumulated work record.

9. Davison filed a grievance alleging that his suspension was without just cause and without proper notification.

10. Guy and Toney also agreed upon August 20, 1986 as the date on which a hearing would be held to discuss Rivers' accumulated work record. On August 15,

1986, a letter was sent to confirm this date. That hearing was postponed and rescheduled for August 22, 1986 by agreement between Guy and Toney.

11. In the early morning of August 22, 1986, Roadway's supervisor Bill Thompson told Rivers that he had heard Rivers was having a disciplinary hearing later that day. Rivers stated that he had not received a letter notifying him of a hearing on August 22 and that as far as he was concerned no hearing would take place.

12. At approximately 7:30 A.M. on the morning of August 22, a Roadway foreman approached Rivers and told him to go to the office for a hearing. Although Rivers went to the office, he informed Guy that he had not received proper notice of the hearing. Although Rivers' Union Business Agent was present, Rivers replied that he did not think he should be there for the hearing and he was not properly represented. While Rivers claims he was excused, the Court finds that he was not.

13. Rivers subsequently received a letter from Roadway dated August 22, 1986 which indicated that as a result of a hearing on his accumulated work record, he was given a two-day suspension.

14. Rivers filed a grievance alleging that his suspension was without just cause and without proper notification.

15. The Toledo Local Joint Grievance Committee (TLJGC) convened and heard both grievances on September 23, 1986. During the hearings, plaintiffs argued that they had not received proper notice for their disciplinary hearings, that if they had received proper notice they would have been present at their disciplinary hearings, and that white employees Sedelbauer, Bradley

and Swartzfager should have had disciplinary hearings scheduled before plaintiffs as Roadway had requested hearing dates for those three individuals prior to requesting hearing dates for plaintiffs. Both grievances were granted based upon "improprieties," and both plaintiffs were awarded two days of back pay.

16. Disciplinary hearings had been requested for Swartzfager on June 6, 1986, Davison on July 14, 1986, Rivers on August 1, 1986, Sedelbauer on August 8, 1986 and for Bradley on August 11, 1986. Swartzfager had a disciplinary hearing scheduled for July 9, 1986 which did not occur as he was on vacation that week. Union Steward Eugene McCord was instrumental in the postponement of Swartzfager's hearing as he informed Guy on several occasions that Swartzfager's attendance record was not that bad and a hearing was not necessary.

17. Based upon these facts and the credible testimony of Dr. Cranny, black employees were not treated differently than white employees with respect to the scheduling of disciplinary hearings.

18. Shortly after the decision of the TLJGC was announced, Roadway's Labor Relations Manager James O'Neill announced there would be disciplinary hearings on employees Rivers, Davison, Bradley, Sedelbauer and Swartzfager within 72 hours. Both plaintiffs were present when O'Neill announced the upcoming hearings. Davison responded that he could not attend as he had a doctor appointment, and McCord responded that he could not attend as it was his day off. After some discussion, O'Neill and Toney agreed upon the date of September 26, 1986 at 7:00 A.M. for the hearings.

19. The race of Swartzfager, Sedelbauer and Bradley is white.

20. On September 25, 1986, B[R]oadway supervisor Robert Kresge delivered and read a written notice of hearing to Davison at work which stated that a hearing would be held for him on September 26, 1986 at 7:00 A.M. and asked him to sign a receipt acknowledging his upcoming hearing. Davison spoke with McCord and refused to sign the paper. Kresge left the written notice on a tool box next to Davison. Davison claims that the notice was not read to him and that he was not notified of the hearing date and time. McCord, however, testified that Kresge read the notice to Davison. Based on this testimony, the Court finds that Davison was told on the morning of September 25, 1986 that a disciplinary hearing would be held for him on September 26, 1986.

21. On September 26, 1986, Toney informed Davison that Roadway was having a hearing for him that day. He told Davison that Davison should attend the hearing because he had been given a direct order to do so and that Davison could be discharged if he did not attend the hearing. Davison maintained that he had not received the proper notice.

22. Davison was then approached by Roadway supervisors Broome and Gates who ordered him to go to the office for a hearing. Davison proceeded toward the office but stopped to talk to Toney and McCord.

23. Kresge approached Davison, in the presence of McCord and Toney, and again ordered him to go into the office, but Davison replied, "I'm talking to Paul, get out of my face." After some time elapsed, Davison walked into the office.

24. Once in the office, a heated discussion ensued between McCord, O'Neill, Toney, and Davison about whether the hearing should take place. Davison was informed that he could be discharged if he did not attend the hearing. Twenty-five minutes elapsed while the parties discussed whether or not to proceed. Finally, O'Neill told Kresge to start the hearing. Kresge started the hearing, and Davison and McCord left the office and returned to work.

25. On September 25, 1986 Rivers was approached by Kresge, who delivered and read to Rivers a written notice of hearing for September 26, 1986 and asked Rivers to sign a form acknowledging that a hearing would be held the next day. McCord, who was present at the time, told Rivers that he was not obligated to sign the form. Rivers refused to sign or take the document acknowledging that a hearing would be held the next day.

26. Shortly after 7:00 A.M. on September 26, 1986, Roadway Supervisors Broome and Gates approached Rivers at work. Broome ordered Rivers to go into the office because Roadway was going to have a disciplinary hearing concerning his accumulated work record.

27. After discussing this matter with Toney, Toney informed Rivers that failure to attend the hearing could result in discharge.

28. Kresge then went to the garage break room where Rivers was speaking with McCord and Toney, told them that the hearing was ready to begin and order Rivers to attend the hearing.

29. Later O'Neill approached Rivers, McCord and Toney and stated that the Company was ready to begin the hearing. Rivers, Toney and McCord went into the office. After O'Neill began the hearing, Rivers walked out.

30. Similarly, on September 25 and 26, 1986, Sedelbauer was directly ordered numerous times by various Roadway supervisors to attend a hearing on his accumulated work record scheduled for September 26, 1986.

31. Sedelbauer, like Rivers and Davison, refused those direct orders to attend his disciplinary hearing on September 26, 1986.

32. Swartzfager was also given direct orders to attend a disciplinary hearing to be held on September 26, 1986. Swartzfager complied with those orders and attended the disciplinary hearing. Swartzfager was given a disciplinary record of hearing but did not receive any other disciplinary time off without pay.

33. Throughout the time of these events on September 26, 1986, Rivers, Davison, Sedelbauer and Swartzfager were punched in and on the clock at work. As such, they were obliged to follow the orders of their supervisors unless the orders required unsafe actions.

34. Rivers was discharged on September 26, 1986 for refusing several direct orders and for his accumulated work record. Rivers was not discharged *because of* his race.

35. Davison was discharged on September 26, 1986 for refusing several direct orders and for his accumulated work record. Davison was not discharged *because of* his race.

36. Sedelbauer was discharged on September 26, 1986 for refusing several direct orders and for his accumulated work record.

37. The only employee to comply with the direct orders of management, Swartzfager, was not discharged on September 26, 1986 but was given a disciplinary record of hearing.

38. The greater weight of the evidence clearly demonstrates that there was no pattern or practice of different treatment of blacks from whites at Roadway's Toledo garage. From the statistical evidence introduced by defendant, the Court finds that blacks and whites were treated equally in the assignment of job duties and the scheduling of disciplinary hearings.

Conclusions of Law

1. This Court has jurisdiction over the parties and subject matter of this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f) and 28 U.S.C. §1331.

2. The Court does not judge the correctness of the defendant's business decision. *Cooper v. North Olmstead*, 795 F.2d 1265, 1271-72 (6th Cir. 1986); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986).

3. The disparate treatment theory of discrimination is the proper framework for analysis. *Kent County Sheriff's Ass'n v. County of Kent*, 826 F.2d 1485, 1492-93 (6th Cir. 1987), *rehearing denied*, 835 F.2d 1146 (6th Cir. 1987).

4. The United States Supreme Court outlined the appropriate analysis of disparate treatment claims in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *U.S. Postal Service Board of Governors*

v. Aikens, 460 U.S. 711 (1983). According to Burdine, plaintiffs must first establish a prima facie case of intentional discrimination, which defendant can rebut by producing a legitimate, nondiscriminatory reason for the discharge. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254-55. If defendant meets this burden of production, plaintiffs must then prove that defendant's asserted motive is pretextual. The need to prove pretext merges with plaintiffs' ultimate burden of persuading the Court that he was the victim of intentional discrimination, a burden that plaintiffs retain at all times. *Id.* at 254-56. In *Aikens*, the Court held that if the trial judge denies defendant's motion for dismissal after completion of plaintiffs' case-in-chief and if defendant offers evidence in support of nondiscriminatory reasons for its action, the *Burdine* presumption "drops from the case" and "the factual inquiry proceeds to a new level of specificity." *Aikens*, 460 U.S. at 715. "The question then becomes for the trial judge, *Aikens* holds, whether plaintiff has carried the burden of persuasion of showing intentional discrimination as would be true in other civil litigation." *Weems v. Ball Metal & Chemical Div., Inc.*, 753 F.2d 527, 529 n.2 (6th Cir. 1985).

5. The Court finds that plaintiffs made out a prima facie case of disparate treatment. The elements of a prima facie case applicable to the fact situation presented here are as follows. First, plaintiffs must show that they are members of a class entitled to protection under the Civil Rights Act. Second, plaintiffs must show that they were subjected to adverse employment action.

Third, plaintiffs must show that they were qualified for their respective positions. Finally, plaintiffs must show that the employer either continued to solicit applications for the vacant positions or replaced plaintiffs with persons not within the protected class. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *Gagne v. Northwestern Nat. Ins. Co.*, 881 F.2d 309, 313 (6th Cir. 1989); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir. 1984). In an appeal from this Court, the Sixth Circuit cautioned that a "[p]laintiff's burden with respect to establishing a prima facie case is not onerous." *Jackson*, 743 F.2d at 377. Plaintiffs have satisfied the second element through the introduction of proof that they were terminated. Defendant has not contended that plaintiffs were not qualified for their respective positions. Nor has defendant contended that it did not fill the positions that plaintiffs occupied. Therefore, the Court finds the third and fourth elements met.

6. In the present case, plaintiffs must prove not only that they were treated differently than the defendant's white employees, but also that this disparate treatment was the result of a discriminatory intent. *Smith v. Pan Am World Airways*, 706 F.2d 771, 773 (6th Cir. 1983). "The ultimate question to be resolved is whether the employer intentionally treated 'some people less favorably than others because of their race,' *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n.15 (1977), not whether the employer treated an employee less favorably than someone's general standard of equitable treatment." *Batts v. NLT Corp.*, 844 F.2d 331, 337 (6th Cir. 1988).

7. Plaintiffs have failed to carry their burden of proving by a preponderance of the evidence that their discharge was racially discriminatory. Plaintiffs have had their day in court. After weighing the testimony of the witnesses and considering all of the evidence, the Court finds that plaintiffs did not carry their ultimate burden of proof. Defendant has articulated legitimate, nondiscriminatory reasons for discharging plaintiffs, i.e., their repeated refusal to obey direct orders. Plaintiffs have failed to demonstrate that defendant's proffered reasons for their discharges were pretextual. Under the substantive standards applicable to Title VII cases, plaintiffs have not established that they were discharged from employment based upon their race.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant's motion to dismiss be, and hereby is, DENIED; and it is

FURTHER ORDERED that judgment be, and hereby is, entered in favor of defendant Roadway Express, Inc. and against plaintiffs Maurice Rivers and Robert Davison.

/s/ JOHN W. POTTER
United States District Judge

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN HARVIS, *ET AL.* V. ROADWAY EXPRESS, INC., *ET AL.*

(Decided January 10, 1991)

RECOMMENDED FOR FULL TEXT PUBLICATION

No. 90-3103

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES T. HARVIS, JR.,
Plaintiff-Appellant,

MAURICE RIVERS and ROBERT C. DAVISON,
Plaintiffs,

v.

ROADWAY EXPRESS, INC.,
Defendant-Appellee,

LOCAL 20, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Decided and Filed January 10, 1991

Before: MERRITT, *Chief Judge*; MARTIN and NORRIS, *Circuit Judges.*

MERRITT, *Chief Judge.* The Supreme Court decided *Patterson v. McLean Credit Union,* 109 S. Ct. 2363 (1989), narrowing the scope of discriminatory contract actions under 42 U.S.C. §1981, shortly after the jury returned a verdict for defendant on plaintiff's §1981 claim. The *Patterson* case forms the basis of plaintiff's novel argument on appeal. The plaintiff has appealed from the District Court's judgment for the defendant after a jury verdict on his race discrimination claim under §1981. He also appeals a judgment for defendant in his Title VII claim, a claim not subject to jury trial, arising out of the same basic facts. The District Court entered the Title VII judgment by applying the doctrine of collateral estoppel based on the jury's verdict on the §1981 claim. The plaintiff now asserts on appeal that his §1981 claim should not have been put to the jury (even though he requested a jury trial) and, therefore, contends that the jury's verdict for the defendant may not be used to preclude his Title VII claim. We disagree on grounds that plaintiff "invited the error," if indeed there was any error, when the District Court put the case to the jury.

Harvis has offered an unusual argument with regard to the effect of *Patterson v. McLean Credit Union,* 109 S. Ct. 2363 (1989). His argument is based on the effect of the *Patterson* case on the application of the doctrine of claim preclusion or collateral estoppel. He does not argue with the *res judicata* principle (arising from considerations of consistency, judicial economy and finality) that the jury's findings on the §1981 claim should control the judge's nonjury adjudication of the Title VII claim in the normal case in which a §1981 claim

and a Title VII claim arise out of the same facts. *See Restatement (Second) of Judgments* §24 (fact that various "legal theories casting liability on an actor may apply to a given episode" does not defeat claim preclusion even though the theories vary as to types of relief) and §25 (damages claim allowing jury trial "considered part of unitary claim [which includes a claim in equity] for purposes of merger and bar") (1982). Rather, plaintiff argues that the retroactive application of *Patterson* would leave him without a legally cognizable §1981 claim because *Patterson* narrowed the scope of §1981 to exclude his claim. Thus he argues that the lack of a valid claim means that the jury verdict should be disregarded for collateral estoppel purposes because the jury had no authority to return a verdict on a legally insufficient claim. Consequently, Harvis argues that his Title VII claim should be remanded to the District Court for new findings of fact because the jury findings and the District Court's judgment entry based upon them was "without meaning." Brief for Appellant at 5.

Defendant has offered a number of legal arguments in response to Harvis' argument, but most of the argument concentrates on the question of the retroactive application of *Patterson*. We do not find the issue of the retroactive application of *Patterson* to be dispositive in this case. Instead, we hold that the District Court must be affirmed under the doctrine of "invited error."

The doctrine of "invited error" refers to the principle that a party may not complain on appeal of errors that he himself invited or provoked the court or the opposite party to commit. *See* 5 *Am. Jur.* 2d §713 (1962). The doctrine has been referred to as "a cardinal rule of appellate review," and federal appellate courts have applied the doctrine to a wide range of conduct. *Crockett*

v. Uniroyal, Inc., 772 F.2d 1524, 1530 (11th Cir. 1985); *see Gundy v. United States*, 728 F.2d 484 (10th Cir. 1984) (burden of proof); *Weise v. United States*, 724 F.2d 587 (7th Cir. 1984) (submission of evidence).

The Sixth Circuit has applied the doctrine of "invited error" on numerous occasions, although none of the applications resembles Harvis' case directly. The Sixth Circuit refused to exclude otherwise inadmissible evidence in *All American Life & Casualty v. Oceanic Trade Alliance Council Int'l, Inc.*, 756 F.2d 474, 479-80 (6th Cir.), *cert. denied*, 474 U.S. 819 (1985), because the plaintiff had "invited" witnesses to make the references it later sought to exclude. Similarly, the Sixth Circuit affirmed the denial of a motion for judgment notwithstanding the verdict in *American Anodco, Inc. v. Reynolds Metals Co.*, 743 F.2d 417, 421 (6th Cir. 1984), because the motion was based on a defense abandoned earlier in the proceedings. *See also Garza v. Indiana and Michigan Electrical Co.*, 338 F.2d 623, 627 (6th Cir. 1964) ("One may not complain of rulings which he invited the court to make."); *Edwards v. United States*, 265 F.2d 909, 910 (6th Cir.), *cert. denied*, 361 U.S. 845 (1959) ("There is no warrant of course for the relieving the accused of the consequences of what appears to have been a planned defense stratagem [admission of incriminating testimony] by the device of condemning as 'clear error' of the trial court a seemingly calculated risk of defense counsel which happened not to achieve the intended result with the jury."); *Corbin v. Baltimore & Ohio Railroad Co.*, 234 F.2d 78, 81 (6th Cir. 1956) ("[A] party cannot be permitted to take advantage of errors which he has, even in good faith, invited or induced the district court to make.").

The doctrine of "invited error" is a branch of the doctrine of waiver by which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside. It is based on reliance interests similar to those that support the doctrines of equitable and promissory estoppel. Having induced the court to rely on a particular erroneous proposition of law or fact, a party in the normal case may not at a later stage of the case use the error to set aside the immediate consequences of the error. Plaintiff cannot complain that the District Court allowed a jury to consider his §1981 claim. He requested a jury trial and thus "invited" the error of a jury verdict in his case. The consequences of plaintiff's action forecloses his request for a remand to the District Court. It is well-settled within the Sixth Circuit that both §1981 and Title VII carry the same standards of proof. Both §1981 and Title VII require that Harvis demonstrate discrimination by defendant in order to prevail. *See Daniels v. Board of Educ. of Ravenna City Schools*, 805 F.2d 203 (6th Cir. 1986); *Jackson v. RKO Bottlers*, 743 F.2d 370 (6th Cir. 1984), *cert. denied*, 478 U.S. 1006 (1986). Since a district court judge is bound by the jury's findings of fact in deciding whether a plaintiff is entitled to any remedial relief under Title VII, a remand in this case is unwarranted. *See In re Lewis*, 845 F.2d 624 (6th Cir. 1988).

That *Patterson* changed some of the elements of the §1981 statutory tort after the jury verdict does not alter the point that the jury found the facts common to both claims against plaintiff's position. The "error" of the District Court, if there was one, was to allow the jury to reach a verdict on a claim that, according to plaintiff, *Patterson* may now render legally insufficient. The

District Court had subject matter jurisdiction over the two claims even if *Patterson* means that the Court should have dismissed the §1981 claim or directed a verdict. Harvis has confused the basic distinction between a lack of jurisdiction and a failure to state or prove a legally sufficient claim. A dismissal for failure to state a claim does not strip a court of subject matter jurisdiction. *See* C. Wright, *Law of Federal Courts* 26 (4th ed. 1983).

Although plaintiff has offered a novel argument with regard to the effect of retroactive application of *Patterson*, he has not demonstrated why he should not be bound by the so-called "error" he induced the District Court to make. He decided to seek a jury verdict on his §1981 claim first, and thus "invited the error," if there was error, of a jury trial that resulted in a verdict for defendant, a verdict that forms a proper basis for the application of the doctrine of claim preclusion. Accordingly, the judgment below is AFFIRMED.